proceeding," post, at 13 – when it became apparent that counsel had neglected the "strategy more obviously defendant's interest,...," post, at 10 more accurately phrased "the effect of the conflict upon counsel's performance was clear to the judge at the close of the probation revocation proceeding."

In Roush the effect of Judge Creany's conflict of interest was clearly apparent when he sua sponte incorporated an injunction hearing testimony, which was based on different issues and a different burden of proof, into the trial on the merits after denying Roush's Motion To Dismiss when Chalkey presented no evidence whatsoever at trial. Judge Creany's division of loyalties that affected his performance while openly becoming an advocate for Chalkey, was based on his later known business relationship with his attorney, Horner.

The letter from Judge Creany to the attorneys of record dated February 19, 2003, limiting his recusal (app. 1) illustrates his personal interest in this case. Judge Creany stated that "If he (Judge Krumenacker) grants the defendant's motion, (Roush's Post Trial Motion to Dismiss) obviously the matter would have to be decided by another judge."

As in United States v. Cronic, 466 U. S. 648, 662, n. 31 (1984), this Court has presumed prejudice when counsel labors under an actual conflict of interest.

However, in Roush, it is clearly undisputed that Judge Creany knew when he issued a Decree Nisi on December 7, 2002, that he had been concealing his conflict of interest with his attorney who he sua sponte appointed as guardian ad litem for Chalkey and to act as her attorney. This Court

should presume prejudice when a trial judge conceals his conflict of interest in the case before him during the proceedings and issuing his findings of fact and conclusions of law in a Decree Nisi. Due Process guaranteed by the 5th and 14th Amendments to The Constitution of The United States of America should require an automatic reversal rule when a trial judge, sitting as the trier of fact, conceals his conflict of interest in the case before him. **This Court should exercise its cert jurisdiction when due process is denied by a state appellate court without *notice* raises and decides on appeal a new issue in order to uphold a trial judges decision.**

The first time on appeal, the majority of nine (9) appeal judges of The Superior Court and the majority of The Supreme Court of Pennsylvania vacated and remanded this case because a meaningful review was not possible, and no evidence was presented by Plaintiff against Defendant at trial citing precedent that a preliminary injunction hearing was for "an urgent necessity for interim relief before the case [could] be heard on the merits." However, at the hearing addressing issues on appeal Chalkey was required to show by clear and convincing evidence that Roush exerted undue influence.

The second time on appeal, on the exact same facts, the majority of three (3) appeal judges of the Superior Court of Pennsylvania raised and decided a new issue limiting Defendant's first Motion to Dismiss as for failure to receive a witness list ("...what they were going to testify to, about, and any types of reports that he has.") and since no one was going to testify against Roush, the Motion to Dismiss was properly denied. The Court failed to address the trial judge's sua sponte incorporation, without notice prior to

trial, of a prior preliminary injunction hearing testimony based on different issues and a different burden of proof than the equity trial on the merits requiring clear and convincing evidence. Rather, the Court found an appearance of an understanding to incorporate and deciding a totally different outcome on the same set of facts.

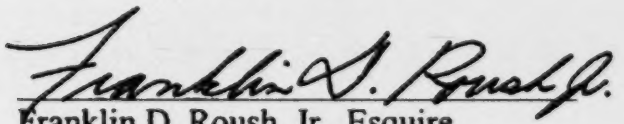
CONCLUSION

For the reasons set forth above, the Court should Grant a Writ of Certiorari.

Dated: Johnstown, Pennsylvania

September 1, 2005

Respectfully submitted,



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(814) 536-6099
Counsel of Record for Petitioner

A1

February 19, 2003

Gary Horner, Esquire
Spence, Custer, Saylor,
Wolfe & Rose
216 Franklin Street
Suite 400
Johnstown, PA 15901

H. Reginald Belden, Jr., Esquire
117 N. Main Street
Greensburg, PA 15601

RE: Chalkey v. Roush
No. 1997 – 3857

Gentlemen:

I signed the recusal order that I dictated at the time we met on Friday, I did limit it, however, to recusing myself from deciding the motions in the case. Once Judge Krumenacker has resolved those matters, I will have to revisit this issue. If he grants the defendant's motion, obviously the matter would have to be decided by another judge. If, however, he denies those motions, it may well be that I could still properly reissue, as a decree nisi, my prior order and thereafter file a final decree.

I solicit your advice in this regard.

Very truly yours,

Timothy P. Creany

TPC:eg

Supreme Court, U.S.
FILED
OCT 2 3 2005
OFFICE OF THE CLERK

No. 05 – 132

IN THE

SUPREME COURT of the UNITED STATES

FRANKLIN D. ROUSH, JR.,

Petitioner,

v.

MARY CHALKEY, a/k/a/ MARY MATULA,

Respondent.

On Petition For Writ of Certiorari To The Superior Court of Pennsylvania, Pittsburgh Office

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PETITION FOR REHEARING

Franklin D. Roush, Jr., Esquire, Pro Se
Counsel for Petitioner
226 Ohio Street
Johnstown, Pennsylvania 15902
(814) 536-6099

QUESTION PRESENTED FOR REHEARING

1. Whether a violation of Due Process arises under the 5th and 14th Amendments to The Constitution of The United States of America when a state appeals court Orders a mandate vacating and remanding a trial court's judgment because no evidence was presented and years later revisits its earlier opinion and without notice to the parties determined that there is no need for any witnesses at a trial on the merits to void a valid deed?

   Answer: Affirmative

LIST OF PARTIES

Petitioner, Franklin D. Roush, Jr., Esquire

Respondent, Mary Chalkey, a/k/a Mary Matula

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OTHER SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED OF A CONTROLLING EFFECT

Justice Kennedy delivered the opinion of the court on June 27, 2005 in Bell, Warden v. Thompson, Gregory 543 U. S. _____, (2005), stating that "Basic to the operation of the judicial system is the principal that a court speaks through its judgments and orders." The court of Appeals failed in Bell, to issue an order or otherwise give notice to the parties that the court was reconsidering its earlier opinion. This Court found that the Court of Appeals abused its discretion and the Court of Appeals judgment was reversed.

In Roush, the Superior Court of Pennsylvania Ordered that a meaningful review was not possible because no evidence was presented at the trial on the merits against Roush, Vacated and Remanded. Years later on the exact same facts, no one testifying against Roush, the Supetior Court of Pennsylvania sua sponte revisited its earlier Order and made a judgment against Roush without any notice to the parties that the appeals court was reconsidering its earlier opinion.

In Roush, no one testified against Roush at the trial on the merits and within less than fifteen minutes of a trial, the judge sitting as trier of fact voided Roush's valid deed.

The Superior Court of Pennsylvania should be held to its earlier Order that Vacated and Remanded to the trial court this case because no one testified against Roush at his trial on the merits. Therefore, there was no evidence to review and as a matter of law Roush's valid deed should not have been voided.

The Superior Court of Pennsylvania's original Order basically illustrated the need for a witness at a trial on the merits. After revisiting sua sponte it Ordered that there is no need for any witness at a trial on the merits.

The Petition for Certiorari should be granted and the Superior Court of Pennsylvania's judgment reversed because witnesses and evidence are necessary to a trial on the merits.

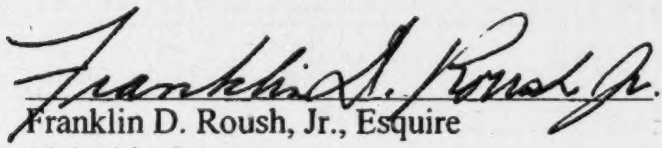
CONCLUSION

For the reasons set forth above, this Court should Grant this Petition For Rehearing.

Dated: Johnstown, Pennsylvania

October 20, 2005

Respectfully submitted,



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